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No. 91-982

In the Supreme Court of the United States

OCTOBER TERM, 1991

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Interstate Commerce Commission imposed certain labor protective conditions in approving an acquisition-of-control transaction involving two rail carriers within its jurisdiction. Subsequently, two arbitrators in separate proceedings reached conflicting decisions as to whether the employees of one of the carriers were entitled to benefits pursuant to the conditions imposed by the ICC. The question presented is whether the ICC exceeded its authority to review arbitration awards applying ICC-imposed labor conditions when it (a) reversed the decision that awarded benefits; (b) refused to reconsider that reversal; and (c) denied review of the decision that refused to award benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 938 F.2d 1009. The decision of the Interstate Commerce Commission (Pet. App. 14a-34a) is reported at 5 I.C.C.2d 934; the earlier Commission decision (Pet. App. 35a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1991. A petition for rehearing was denied on August 21, 1991. Pet. App. 117a-118a. On November 8,

1991, Justice O'Connor extended the time for filing the petition for a writ of certiorari to and including December 19, 1991, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under 49 U.S.C. 11341-11347, the Interstate Commerce Commission (ICC or Commission) has exclusive authority to examine and approve mergers and acquisitions involving carriers within its jurisdiction. *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1159 (1991). When the Commission approves an acquisition of control of railroads embraced within 49 U.S.C. 11343(a), the Commission must impose labor protective conditions for rail employees "affected by the transaction." 49 U.S.C. 11347. The Commission has determined that the appropriate level of labor protection for these acquisitions is that set forth in *New York Dock Ry.—Control—Brooklyn E. Dist. Terminal*, 360 I.C.C. 60 (1979), aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979) (*New York Dock*).[1]

2. Under Section 11 of the *New York Dock* conditions, 360 I.C.C. at 87-88, disputes between a railroad and its employees over application of the protective conditions must be resolved by arbitration. The arbitrators in such a dispute act under a delegation of the

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[1] Affected rail employees are typically afforded the following *New York Dock* benefits: displacement allowances equal to the difference between pre-transaction and post-transaction earnings; dismissal allowances monthly for a period of employment up to six years, or a lump sum separation allowance equal to 16 1/2 month's salary; all fringe benefits; reimbursement of moving expenses; 90-day pre-consummation notice; and an implementing agreement prior to consummation. 360 I.C.C. at 84-90.

Commission's statutory authority to impose labor protective conditions. See *United Transp. Union* v. *Norfolk & W. Ry.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987), cert. denied, 484 U.S. 1006 (1988). Accordingly, in contrast to arbitration awards issued under the Railway Labor Act (45 U.S.C. 151 *et seq.*), which are subject to direct review in the United States district courts, see, *e.g.*, 45 U.S.C. 153; *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 34 (1987), arbitral awards issued pursuant to ICC-imposed labor conditions are "orders of the Commission" within 28 U.S.C. 2321(a) and therefore subject to review in the United States courts of appeals, *United Transp. Union*, 822 F.2d at 1120; see also *Brotherhood of Locomotive Eng'rs* v. *Interstate Commerce Comm'n*, 808 F.2d 1570, 1579 n.75 (D.C. Cir. 1987).

3. In *Chicago & N.W. Transp. Co.—Abandonment*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*) (Pet. App. 119a-133a), the Commission asserted the authority to review these arbitral awards prior to judicial review in the courts of appeals. The Commission also announced that it would conduct review in accordance with the deferential standards that this Court adopted in the so-called "*Steelworkers Trilogy*"[2] for judicial review of arbitral awards under collective bargaining agreements. The Commission stated that it would not review an arbitrator's award "on issues of causation, the calculation of benefits, or the resolution of other factual questions" but would instead limit review to "recurring or otherwise significant issues of general importance regarding the interpretation of [its] labor protective conditions." Pet. App. 130a. The Commission further stated that it would vacate an ar-

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[2] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

bitral award only when "there is egregious error, the award fails to draw its essence from [the labor conditions], or the arbitrator exceed[ed] the specific contract limits on his authority." Pet. App. 129a, citing *Loveless* v. *Eastern Air Lines, Inc.*, 681 F.2d 1272, 1275-1276 (11th Cir. 1982). The courts have upheld the ICC's authority to review arbitral awards under these standards. *International Bhd. of Elec. Workers* v. *Interstate Commerce Comm'n*, 862 F.2d 330 (D.C. Cir. 1988) (*Electrical Workers*); see also *Wallace* v. *Civil Aeronautics Bd.*, 755 F.2d 861, 864-865 (11th Cir. 1985); *Pan American World Airways, Inc.* v. *Civil Aeronautics Bd.*, 683 F.2d 554, 562 (D.C. Cir. 1982).

4. In January 1978, the Commission authorized the Atlantic Richfield Company (ARCO), following ARCO's purchase of the Anaconda Company of Montana, to control Anaconda's two wholly owned railroad subsidiaries, the Butte, Anaconda & Pacific Railway Company (BAP) and the Tooele Valley Railroad Company (TOV). Pet. App. 61a-66a. The Commission conditioned its approval upon ARCO's extending *New York Dock* labor protection benefits to any BAP or TOV employees adversely affected by the acquisition of control. *Id.* at 64a.[3]

BAP primarily transported copper concentrate from Anaconda's mines in Butte to its smelting facilities in the city of Anaconda. Pet. App. 15a. ARCO's acquisition of control in early 1978 did not disturb BAP's operations or its existing employment levels. *Id.* at 16a, 52a. Approximately two years later, however, the copper market collapsed, eventually forcing

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[3] In approving ARCO's acquisition of control, the Commission originally imposed the labor protective conditions formulated in *Oregon Short Line R.R. — Abandonment—Goshen*, 354 I.C.C. 76 (1977), but it later substituted the *New York Dock* conditions. Pet. App. 55a-60a.

Anaconda to curtail mining at Butte and to close its smelter operations in Anaconda, and ultimately — resulting in the loss of much of BAP's traffic and a reduction in its work force. *Ibid.*

5. In 1982, the United Transportation Union (UTU) asserted that BAP's reduction-in-force was caused by ARCO's 1978 acquisition of control of BAP. Based on that assertion, UTU claimed *New York Dock* benefits for affected BAP employees whom it represented.

In September 1984 (Pet. App. 89a-109a), as further clarified in February 1985 (*id.* at 87a-88a), Arbitrator Cassle found that BAP was liable for those benefits. Arbitrator Cassle acknowledged that the only "effects to the employees of [BAP] after [ARCO's] acquisition would be those that might result from economic considerations." *Id.* at 103a (emphasis omitted). Nonetheless, he concluded that the *New York Dock* benefits should be awarded because ARCO, Anaconda, BAP, and the ICC had "contracted" (*id.* at 103a-104a) with BAP employees to provide *New York Dock* benefits for *any* adverse post-transaction job changes, "regardless of cause." *Id.* at 88a.

This contractual duty, in Arbitrator Cassle's view, arose from the statement in the application for ICC approval that ARCO's acquisition of control was expected to have no adverse effect on BAP employees; Arbitrator Cassle noted that the ICC referred to that statement in its decision approving the acquisition of control. Pet. App. 103a-104a. Arbitrator Cassle believed that the economic factors causing BAP's reduction-in-force were foreseeable at the time of the application. *Ibid.* He reasoned that, by referring to the statement predicting no adverse effect and by making its approval subject to the *New York Dock* conditions, the Commission entered into an "express

contract" (*id.* at 103a) with the applicants to provide *New York Dock* benefits to employees "who were affected by such economic factors." *Id.* at 104a.

6. Other labor organizations[4] representing BAP employees likewise claimed *New York Dock* benefits, asserting claims substantially similar to UTU's. Pet. App. 17a. In February 1988, Arbitrator Sickles rejected the Unions' claims. Arbitrator Sickles determined that there was no causal relationship between ARCO's acquisition of control of BAP and the operational changes that resulted in loss of work or dismissal of BAP employees. *Id.* at 27a-28a.

7. In March 1988, the Commission set aside the Cassle award. The Commission concluded that Arbitrator Cassle had misinterpreted the scope of labor protection imposed in the Commission's order approving ARCO's acquisition of control. Pet. App. 35a-54a. The Commission initially observed that the *New York Dock* conditions reflect the ICC's view of the minimum protections required by 49 U.S.C. 11347 for employees that may be "affected" by acquisition-of-control transactions subject to Commission approval under 49 U.S.C. 11343. Pet. App. 46a-48a. The Commission further observed that these statutorily derived protections are accorded only when the "transaction [is] the proximate cause of the [employee's] injury." *Id.* at 50a, citing *Southern Ry.—Control—Central of Georgia Ry.*, 317 I.C.C. 729, 730-731 (1963), aff'd *sub nom. Railway Labor Executives' Ass'n* v. *United States*, 226 F. Supp. 521 (E.D. Va.), vacated on other grounds, 379 U.S. 199 (1964) (per curiam) (*Central of Georgia*).

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[4] The Brotherhood of Maintenance of Way Employees, the Brotherhood of Railway, Airline & Steamship Clerks, and the Brotherhood of Railway Carmen [hereinafter referred to as the Unions].

The Commission determined that Arbitrator Cassle erred in interpreting the Commission's order approving ARCO's acquisition of control to provide for *New York Dock* benefits without regard to causation. Pet. App. 49a. The Commission noted uncontradicted statements by ARCO, Anaconda, and BAP that they did not negotiate any agreement to provide BAP employees with a greater level of labor protection than provided for in *New York Dock*. *Id.* at 47a-49a. The Commission rejected the notion that any such agreement could be inferred from the statements in the application indicating that no adverse effect on employees was expected. Those statements, the Commission noted, addressed 49 U.S.C. 11344(b)(1)(D) and represented the applicants' "reasonable conclusions" that the acquisition itself would produce no detrimental effect; they were not promises of 49 U.S.C. 11347 benefits triggered by adverse events unrelated to the transaction. Pet. App. 48a-49a. The Commission also rejected the notion that its order approving the transaction imposed anything beyond the *New York Dock* conditions. *Id.* at 49a, 64a. Accordingly, the ICC concluded, under the *Lace Curtain* standards, that the arbitrator's determination of "any cause" *New York Dock* liability "failed to draw its essence from the conditions imposed by th[e] [ICC]" and "exceeded the limits of [the arbitrator's] authority as defined by the *New York Dock* conditions." Pet. App. 46a.

Having concluded that Arbitrator Cassle's award was based on a flawed premise, the Commission examined the record. It found that "changing market conditions in the copper industry" produced the adverse employee impact, not ARCO's acquisition of BAP, Pet. App. 52a, thus affirming Arbitrator Cassle's factual finding that "the employees were affected by economic factors which arose subsequent to the

acquisition," *Id.* at 103a. Since those factors were unrelated to the transaction, the causal requirement for *New York Dock* liability had not been met. The Commission accordingly vacated the Cassle award.

8. UTU petitioned the ICC to reopen and reconsider its reversal of the Cassle award, and the Unions petitioned for review of Arbitrator Sickles' decision rejecting the Unions' claims for *New York Dock* benefits. After consolidating the petitions, the Commission denied them both. Pet. App. 14a-34a. The ICC rejected the Unions' argument that Arbitrator Sickles was bound by Arbitrator Cassle's award on similar claims. *Id.* at 30a. The Commission determined that Arbitrator Sickles conducted an appropriate *New York Dock* causation analysis, and it therefore had no basis to review or disturb his factual determination. *Id.* at 31a-33a.

9. Petitioners sought review of the various ICC orders in the United States Court of Appeals for the Ninth Circuit, and the court affirmed.[5] Pet. App. 1a-

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[5] Five related proceedings in the United States District Court for the District of Montana were stayed pending disposition by the court of appeals: *BAP* v. *UTU*, No. CV-85-83-BU (filed Dec. 5, 1983, seeking to set aside the Cassle award); *UTU* v. *BAP*, No. CV-86-145-BU (filed Dec. 1, 1986, to enforce the Cassle award); *BMWE* v. *BAP*, No. CV-88-25-BU (filed Apr. 16, 1988, to review the Sickles Award); *UTU* v. *ICC*, No. CV-88-38-BU (filed May 13, 1988, to set aside ICC decision reversing the Cassle award); *BMWE* v. *ICC*, No. CV-89-133-BU (filed Dec. 18, 1989, seeking review of ICC's refusal to reconsider its reversal of the Cassle award). After the court of appeals issued its decision in the present case, BAP and ARCO moved to dismiss the district court litigation for lack of jurisdiction; they argued that the Ninth Circuit's decision makes clear that review of arbitral awards issued pursuant to Commission-imposed labor protection lies first with the ICC, and then with the courts of appeals. By order of September 27, 1991, the district court stayed consideration of the motion pending disposition by this Court.

13a. The court adopted the "rule" and "reasoning" of the District of Columbia Circuit in *Electrical Workers*, which upheld the ICC's authority to conduct *Lace Curtain* review of its delegated arbitration awards. Pet. App. 10a. The court then held that the Commission's review of the Cassle and Sickles arbitrations was a proper exercise of that authority. In particular, the court agreed with the ICC that, in finding a pre-transactional contract to accord *New York Dock* benefits for any post-acquisition job changes, Arbitrator Cassle "fashioned an agreement that simply did not exist" and thus "exceeded the scope of [his] jurisdiction" as defined by the *New York Dock* conditions. Pet. App. 12a. Thus, "the ICC's decision to vacate his award was neither arbitrary, nor capricious, nor in excess of its jurisdiction." *Ibid.* The court also determined that "the ICC did not substitute its findings of fact [on the issue of causation]," but "merely reiterated Arbitrator Cassle's earlier findings" that any adverse employee effects occurred through changing "economic conditions" in the copper industry, not ARCO's acquisition of control. *Id.* at 12a-13a. Finally, having determined that the Commission "properly reviewed and vacated the Cassle award," the court held that the Cassle award did not bind Arbitrator Sickles. *Id.* at 13a.

ARGUMENT

Petitioners do not challenge the ICC's authority to review arbitral awards, such as those of Arbitrator Cassle and Arbitrator Sickles in this case, that interpret ICC-imposed labor protective conditions. Nor do petitioners challenge the ICC's *Lace Curtain* standards for conducting that review. Instead, petitioners contend that the Commission departed from the *Lace Curtain* standards in reversing Arbitrator Cassle's award. The court of appeals correctly rejected that

contention, and its decision does not conflict with that of any other court of appeals. Further review is therefore not warranted.

As the court of appeals correctly held, the ICC's reversal of the Cassle award was not a departure from the *Lace Curtain* standards. Pet. App. 12a-13a. In *Lace Curtain*, the Commission stated that it would review arbitral awards that raise "significant issues of general importance regarding the interpretation of [its] labor protective conditions." Pet. App. 130a. Arbitrator Cassle's award presented such an issue. Arbitrator Cassle improperly determined the scope of protection that the Commission imposed when it approved ARCO's acquisition of control subject to the *New York Dock* conditions. The Commission has a significant interest in the integrity of the *New York Dock* conditions. They represent the Commission's interpretation of 49 U.S.C. 11347 as requiring proof of proximate causation.[6] Arbitrator Cassle's award eviscerated that requirement by imposing, in effect, "strict" *New York Dock* liability. As a result, Arbitrator Cassle's award "fail[ed] to draw its essence" from the *New York Dock* conditions; it was therefore subject to reversal under the *Lace Curtain* standards. Pet. App. 129a; see also *United Steelworkers* v.

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[6] Section 11(e) of the *New York Dock* conditions provides that a railroad may avoid liability for benefits by proving that factors "other than the transaction" caused the adverse effect on which a claim for benefits is based. Pet. App. 32a n.15. The Commission has accordingly refused to allow recovery of benefits based only on a showing that an adverse effect would not have occurred "but for [the transaction]," reasoning that upholding recovery based on such an attenuated standard of causation would restrict rail carriers from avoiding liability under Section 11(e) by showing that other factors caused the adverse effect. See *Brotherhood of Maintenance of Way Employees* v. *Interstate Commerce Comm'n*, 920 F.2d 40, 44 (D.C. Cir. 1990).

Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (an arbitrator's award "is legitimate only so long as it draws its essence from the collective bargaining agreement"); *Loveless*, 681 F.2d at 1275-1276; cf. *Norfolk & W.R.R.* v. *Nemitz*, 404 U.S. 37, 43-45 (1971) (ICC approval is required before employee rights under ICC-imposed labor protective conditions can be varied).

The court of appeals was also correct in holding that the Commission did not substitute its findings of fact for those of Arbitrator Cassle. Pet. App. 12a. On the contrary, the Commission merely adopted Arbitrator Cassle's own finding that BAP employees were affected solely by changing market conditions in the copper industry. *Id.* at 13a, 103a. Rather than disputing this finding, the ICC rejected Arbitrator Cassle's legal conclusion that it was "irrelevant" to the issue of *New York Dock* liability. Pet. App. 103a. Thus, the ICC did not exert authority "exceed[ing] that generally possessed for purposes of arbitration review" (Pet. 16) by impermissibly reviewing causation issues.[7]

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[7] Nor did the ICC deprive UTU of due process by "retroactive" *Lace Curtain* review of the Cassle award or by any delay in that review, as petitioners contend. Pet. 12-14. "When cause exists," 49 U.S.C. 11351 directs the ICC to issue supplemental orders in proceedings under 49 U.S.C. 11343 (control transactions) and 11347 (arbitral decisions issued pursuant to ICC-imposed labor protection). Arbitrator Cassle's misinterpretation of the *New York Dock* conditions provided "good cause" to issue such an order. See *Illinois* v. *Interstate Commerce Comm'n*, 713 F.2d 305, 310 (7th Cir. 1983). In addition, 49 U.S.C. 10327(g)(1) grants the ICC discretion to reopen and reconsider its previous orders "at any time" because of "material error," and *Lace Curtain* review to rectify the Cassle award was not an abuse of that discretion. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946). Petitioners' further contention (Pet. 14) that the ICC improperly failed to allow timely intervention by UTU does not establish a

Accordingly, the court of appeals' decision does not conflict with *Brotherhood of Locomotive Eng'rs* v. *Interstate Commerce Comm'n*, 885 F.2d 446 (8th Cir. 1989) (*BLE*), as petitioners contend (Pet. 19). Petitioners' reliance on *BLE* rests on their erroneous assertion that the Commission overturned Arbitrator Cassle's factfinding on causation. Moreover, while the court in *BLE* determined that the ICC erred in reviewing an issue of causation, that determination was dictum, since the court's principal holding was that the ICC lacked jurisdiction to review the arbitral award in that case. 885 F.2d at 449-450.[8]

The other decisions upon which petitioners rely (Pet. 18) merely stress the limited nature of review of arbitration awards called for under the *Steelworkers Trilogy*. The court of appeals' decision here is in harmony with those decisions; the court properly concluded that the Commission's review was in keeping with the *Lace Curtain* standards derived from the *Steelworkers Trilogy*.[9]

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due process violation. UTU submitted a letter to the ICC in February 1987 detailing UTU's position on the Cassle award, and UTU's petition to intervene contained lengthy additional arguments and evidence, all of which were fully considered by the ICC. Pet. App. 26a.

[8] In *BLE*, the court held that the ICC lacked jurisdiction to review an arbitral award because the award was made pursuant to a merger implementing agreement that provided for review pursuant to Section 3 of the Railway Labor Act (RLA), 45 U.S.C. 153 Second. The court held that, as applied to the circumstances of that case, Section 3 of the RLA vested review authority solely in the district courts, not the ICC. *BLE*, 885 F.2d at 449-450. That holding is inapposite here, because the ICC approved ARCO's acquisition of control pursuant to 49 U.S.C. 11347, and the arbitration proceeded under the Interstate Commerce Act.

[9] The decisions cited by petitioners (Pet. 18) concern review of arbitral awards by courts, not by agencies. *Armstrong Lodge No. 762* v. *Union Pac. R.R.*, 783 F.2d 131,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992

134-135 (8th Cir. 1986); *Ormsbee Dev. Co.* v. *Grace*, 668 F.2d 1140 (10th Cir.), cert. denied, 459 U.S. 838 (1982); *Ferrick* v. *Baltimore & O.R.R.*, 447 F.2d 89, 91-92 (3d Cir. 1971); *Ludwig Honold Mfg. Co.* v. *Fletcher*, 405 F.2d 1123, 1125-1129 (3d Cir. 1960). In reviewing arbitral awards, the ICC has adopted the same standards of review that, under the *Steelworkers Trilogy*, are to be applied by courts. The Commission adopted those standards as a matter of discretion, however, reasoning that the policies that lead courts to defer to arbitral awards also apply to review by agencies. Pet. App. 129a-131a. Consequently, the courts have recognized that the ICC could properly claim broader review authority where, as here, the arbitral award results from authority delegated by the ICC and interprets conditions that the ICC imposed in the exercise of its statutory mandate. *Wallace* v. *Civil Aeronautics Bd.*, 755 F.2d at 864-865.